

IN THE MATTER OF THE HUMAN RIGHTS CODE OF ONTARIO

and

IN THE MATTER OF THE COMPLAINT OF DAVID MORGOCH
ALLEGING DISCRIMINATION IN EMPLOYMENT BY THE CITY OF OTTAWA
ON THE BASIS OF HANDICAP

INTERIM DECISION

(REGARDING AN OBJECTION TO THE ADMISSION OF A DOCUMENT)

The complainant, David Morgoch, suffers from seasonal allergies. In his complaint he alleges that his application of January, 1985, seeking employment as a firefighter with the City of Ottawa, was wrongfully rejected on the basis of that handicap. Since it would not then be wrongful to refuse to employ him, one of the issues before me is whether this particular handicap renders Mr. Morgoch "incapable of performing or fulfilling the essential requirements attending the exercise" of the employment in question. (The Human Rights Code, 1981, s.16 (1) (b).) Thus, it is necessary to know something of the physical demands involved in the duties of a firefighter in order to determine whether his handicap would prevent the complainant from performing or fulfilling those duties.

In the course of cross-examining the respondent's first witness, counsel for the Commission asked a series of questions relating to the City's recruitment process for firefighters, with particular reference to improvements that might have been made to that process subsequent to 1985. (It may be observed, incidentally, that no objection was made to the asking of these questions.) Upon discovering that a final report had been

received recently from consultants engaged by the City of Ottawa to consider the physical fitness and agility aspects of firefighting and their relationship to the recruitment process, counsel for the Commission asked the witness if she could bring the document to the hearing. She replied that she could not, because the document had not yet received City Council approval. Counsel then asked the board to order the production of the report which the consultants (Fraser Shaw and N. Gledhill) have entitled "A Study to Determine the Physical Demands of Firefighting".

Counsel for the City objected to the production of the document on the basis, first, that it was not relevant because the City had not approved or adopted it: the document is simply a report expressing the views of the consultants who prepared it, and not the views of the City. The second basis for his objection to the production of the document was that the situation is akin to that involved when a plaintiff seeks to introduce as evidence of negligence the subsequent remedial action taken by a defendant to avert similar harm in the future, it being his suggestion that such evidence falls within the ambit of an exclusionary rule making it inadmissible in these proceedings.

As to the first objection, in my view the relevance of the consultants report does not depend upon whether the City had approved or adopted it, unless the only issue was whether the City had changed its procedures accordingly. Provided it is relevant, a consultant's report could be introduced by either

party in support of its submissions, whether or not that report had been adopted by the party who commissioned it, or by anyone. The mere fact that it has not been adopted does not make it irrelevant.

That portion of the document that counsel for the Commission wishes to introduce is entitled "Literature Review: The Physical Demands of Firefighting and the Characterization of the Physical Demands of Firefighting". Having regard to the nature of the complaint and the possible defence of incapacity to perform the work in question, I am satisfied that, at least to the extent that it relates to the physical demands of firefighting, the material in question may be of some relevance to the issues before me. Indeed, counsel for the City did not press vigorously a submission to the contrary.

As was said by Mr. Justice Chilcott in Algoma Central Railway v. Herb Fraser and Associates Ltd. et al., 66 O.R. (2d) 330, at 334: "It is axiomatic that evidence which is relevant is admissible unless some policy reason exists for its exclusion." Moreover, the onus clearly is on the party seeking to exclude relevant evidence to show why it is not to be admitted. The only argument made by counsel for the City in that regard was based on the exclusionary "rule" considered in the Algoma Central Railway case (supra), with particular emphasis upon the dissenting view of Mr. Justice White.

The Algoma Central Railway case was an action for damages in respect of harm caused by a fire on a ship, allegedly arising out

of the defendants negligence or, alternatively, breach of contract. During the course of discovery the Master directed the defendants to answer questions relating to safety precautions taken by them after that fire. Although this ruling was reversed on appeal to a judge, it was upheld upon further appeal to the Divisional Court, Mr. Justice White dissenting.

The "rule" that was under consideration in Algoma Central Railway appears quite narrow and specific, as the following extract from the decision of Chilcott J. (at pp. 332-333) indicates:

The "old line" of authorities is summarized in the Law Reform Commission "Report on Evidence" [as follows]:

21. Evidence of measures taken after an event, which if taken previously would have made the event less likely to occur, is inadmissible to prove negligence or culpable conduct in connection with the event, except when offered to rebut an allegation regarding the feasibility of precautionary measures.

As to the rationale for the rule thus described, Chilcott J. goes on as follows (at p. 332):

Such evidence is excluded, it is said, because its probative value in proving negligence is only slight, since one might make repairs after an accident out of an abundance of caution. Moreover, the policy goal of encouraging people to take precautionary measures after an accident, without having to fear that evidence of such actions will be used against them, outweighs the probative value of the evidence.

Later in his judgment (at pp.334-335) Mr. Justice Chilcott expresses his and Mr. Justice McKeown's disagreement with that rationale in these terms:

We are of the view that the rationale for the rule

must be looked at anew. ... it has always been admitted that evidence of remedial measures has at least some probative value. However, the evidence is excluded on policy grounds in order that people are not discouraged from taking precautionary measures which may be used later against them. This is a fallacious argument. It cannot be said that, rather than furnishing some evidence which may or may not be prejudicial to one's defence of an action, one will instead take no remedial measures thus risking further actions being brought by later injured plaintiffs.

In coming to this conclusion we agree with the comments of Trainor J. in Bigras v. C.N.R.:

I cannot agree that a responsible citizen would be influenced by considerations of liability in deciding whether or not repairs or alternatives should be made to improve a site under his control. Therefore, I cannot agree that the evidence should be excluded for policy reasons.

Having thus critically described the "old rule" in question, Mr. Justice Chilcott indicates (at p. 334) that "[i]n place of the older case-law, a more recent line of authorities is being preferred as the better view." He goes on as follows:

While the older cases have refused to allow such questions to be asked both at trial and on discovery, the newer cases have permitted them on one of two stated grounds:

(1) (i) The evidence may not of itself be evidence of negligence but may have probative value after other evidence of negligence has been adduced.

(ii) The evidence may be relevant to an issue other than negligence (which has always been recognized as being outside the exclusionary rule).

(2) The questions should be allowed at the examination for discovery stage, leaving admissibility and weight to be determined by the trial judge.

Further along in his judgment (at p. 335) Chilcott J. observes that "[s]ince there are exceptions to the exclusionary rule which may allow for the admission of evidence of remedial

measures, such as where it shows feasibility or knowledge, how can it be said with certainty at the discovery stage that such evidence will or will not be admissible at trial unless that area can be discovered upon?" He and Mr. Justice McKeown were of the view that the discovery process should not be "unduly restricted by concerns about the admissibility or weight which may be given to the evidence at trial." He concluded for the majority that "such questions can be put at the examination for discovery" and that "matters of admissibility and the weight to be given to such evidence at trial should be left to the trial judge to determine."

In his dissent, Mr. Justice White expressed the rule in similarly narrow terms (beginning at p. 336):

The reason why evidence of remedial measures taken after an event to prevent the recurrence of a similar event is not admissible is one of policy. Of course, such evidence is in a sense, relevant, even though the relevance may be slight ... the reasons for the rule are as follows. The probative value of remedial actions in showing negligence is slight. One might make repairs after an accident out of abundant care and not the care to be expected of the reasonably prudent person. People should be reinforced in taking additional precautionary measures after an accident without having them under the threat that evidence of such praiseworthy conduct will be turned against them. The slight probative value of such evidence is outweighed by the desire to promote the policy goal. I regard the rule as essentially an exclusionary rule rather than a rule of relevance. ... At the risk of being repetitive I take it to be established law in Ontario that evidence of remedial measures taken by a defendant after an accident so as to prevent the recurrence of such an accident is not admissible in evidence unless such evidence is relevant to some issue in the lawsuit other than negligence. ... The validity of the policy is no different on discovery than it is at trial.

In my opinion, the Algoma Central Railway case is not authority for the proposition that the report the Commission seeks to introduce is inadmissible in these proceedings. To begin with, the complaint before this board does not involve any issue of harm caused by negligence, nor does the document in question deal with remedial measures in that context. Even if the "rule" in question is expressed in broader terms (as in Murphy v. St. Catherines General Hospital, [1964] 1 O.R. 239), it would not appear to assist the respondent. In a ruling made by him during the trial Mr. Justice Gale stated in the Murphy case that:

The rights and liabilities of the contesting parties are to be determined in the light of the circumstances which existed shortly after midnight on February 1, 1961 ... and in forming a judgment with respect to those rights and liabilities, the court ought not, in my opinion, to be influenced, if it could be influenced, by subsequent action or modifications. Hindsight is a great thing, and if, following misadventure, the court were to allow, in trials such as this, evidence of changes, corrections, repairs, new designs or new thought, the process might almost be endless.

Stated broadly, the policy upon which the rule rests appears to be the assumption that where the defendant's practice in a particular matter is alleged to have caused the plaintiff harm, the issue of fault or culpability cannot be proved by evidence that that practice has been altered so as to prevent future harm of the kind complained of. Thus, it might be argued that where the complaint is that the complainant was "harmed" by certain aspects of the respondent's hiring process, evidence that that process was altered so as to preclude similar harm in the future

is inadmissible. This would appear to be the basis of the argument made by counsel for the City, and I find that it is not apt in the circumstances before me.

There is no evidence that the report in question was commissioned as a result of Mr. Morgoch's complaint, let alone that the City has made any attempt to alter its standards so as preclude a refusal of employment as a firefighter simply because the applicant suffers from allergies or asthma, nor is it suggested that the report might be taken to constitute evidence to that effect. On the contrary, not only has the City not yet adopted any of the recommendations of the report, but which, if any of them, will ever be adopted will not be known until some time after these proceedings have been terminated. At present, the report in question is nothing but the opinion of consultants. It does not amount to a "subsequent action or modification" taken or made by the respondent "following misadventure" in order to avert future similar harm to others. It is not "evidence of changes, corrections, repairs, new designs or new thought" made or formulated by the respondent as a remedial measure in order to preclude a recurrence of the "harm" complained of by Mr. Morgoch.

Even if, contrary to the assertions in its 1985 employment standards and practices, the City of Ottawa had subsequently concluded that candidates for firefighting positions are not necessarily incapable of performing the duties involved in such work simply because they suffer from allergies and (or) asthma, I would find it difficult in these proceedings to exclude evidence

to that effect. Surely the City of Ottawa is to be regarded as a responsible corporate citizen. Surely it would not postpone the eradication of practices which (ex hypothesi) it had come to recognize as being unlawfully discriminatory simply in order to avoid the chance that a present complainant might seek to introduce the changed practice as constituting some evidence that persons suffering from his handicap are not necessarily incapable of functioning as firefighters. Surely public policy does not require the exclusion of such evidence in order to encourage respondents in human rights cases to avoid unlawfully discriminating against others.

In any case, it is my view that such a change of practice and standards would not constitute "remedial action"; rather, it would simply be the recognition of a state of things not previously recognized. After all, whether persons afflicted with such conditions are physically able to perform as firefighters is a question of fact; the City cannot by simple fiat deprive anyone of the actual capacity to do a given task, nor can it thus confer that capacity on anyone who lacks it.

Finally, since any change in hiring standards brought about by new information regarding the firefighting capacity of persons with allergies and (or) asthma would not be evidence of any actual intent to discriminate against a previous complainant, such evidence does not tend to establish any element of fault or culpability as the exclusionary rule appears to contemplate. It would only be evidence going to show that persons afflicted with

the particular handicap are not necessarily incapable of discharging the functions entailed in the work.

Having concluded that the question of the admissibility of the report sought to be introduced in these proceedings simply does not fall within the scope of the exclusionary rule relied upon by the respondent, either as expressed by the majority view or in the dissenting judgment in the Algoma Central Railway case, it is unnecessary for me to express any opinion as to whether that rule is one that ought to be followed in proceedings under the Human Rights Code of Ontario by a board that is not in any case bound by the formal rules of evidence. Nor is it necessary for me to deal with the dilemma that the rule's applicability to the facts before it would pose in proceedings such as these, namely: since there is no discovery process under the Ontario Human Rights Code, should such evidence be excluded, or should it be admitted, for that very reason?

For the above reasons, it is my decision that the document in question is to be admitted in these proceedings and may be referred to by counsel in the course of argument.

Dated this 19th day of June, 1989.



H.A. Hubbard, chairman.



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June 21st, 1989

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Re: The Complaint of David Morgoch alleging
discrimination in employment on the basis of
handicap by the City of Ottawa

Dear Mr. Griffin,

I have attached a signed copy of the interim decision I
handed down last Monday since the transcript version is unlikely
to be in a convenient form.

Yours sincerely,

H.A. Hubbard, Q.C.
Chairman

REC'D		O.H.R.C.	
INITIAL	DATE	INITIAL	DATE
JUN 27 1989			

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